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Supreme Court of the United States

October Term, 1976

No. 76-1134

CHARLES H. GAMAREKIAN, JOSEPH J. REGA, and GEORGE SANTORIELLO,

PETITIONERS,

-v-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1976

No.

CHARLES H. GAMAREKIAN, JOSEPH J. REGA,
and GEORGE SANTORIELLO,

PETITIONERS,

-v-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The above-named Petitioners respectfully pray that this Court grant a Writ of Certiorari to review the Judgment-Order of the United States Court of Appeals for the Third Circuit rendered November 12, 1976 which affirmed the judgment of the United States District Court for the District of New Jersey convicting the Petitioners of

conspiracy to violate the securities laws (18 U.S.C. §371) and convicting Gamarekian and Rega of substantive violations of the Securities Laws as well (15 U.S.C. 18h(c), 78ff(a) and Title 17 C.F.R. §240.8c-1; §240.10b-5, etc.).

Also convicted were Christos L. Netelkos and Georgette Ysrael.*

Santoriello and Ysrael were convicted only of the conspiracy and were not even named in the other counts (2-34). The substantive counts embraced 15 U.S.C. §§78h(c), 78q(a), 17 C.F.R. §§240.8c-1, 240.10b-5, 17a-5; 18 U.S.C. 1001 and 1002. The trial was held before Hon. Herbert Stern and a jury.

Gamarekian and Rega were sentenced

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*Netelkos and Ysrael have separately petitioned this Court for CERTIORARI and we adopt their arguments and ask this Court to deem those arguments made on behalf of those Petitioners as if fully set forth herein. We see no point in merely reprinting their points herein in addition to ours. Their Petition is from the same trial and the same Judgment-Order.

to concurrent terms of 5 years each and fines; Santoriello to 18 months as was Ysrael; and Netelkos to 11 years and a $50,000 fine.

OPINION BELOW

No formal opinion was written by the Third Circuit, but the memorandum decision is reprinted in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is predicated on 28 U.S.C. §1254(1). The Court of Appeals denied a motion for a rehearing and for a rehearing en banc on the 20th of December, 1976. Mr. Justice William Brennan, Jr. signed an order extending Petitioners' time to file until the 18th of February, 1977.

QUESTIONS PRESENTED

1- WHETHER PETITIONERS WERE PROPERLY CONVICTED OF CONSPIRACY IN VIEW OF THE FACT THAT SEVERAL, NOT A SINGLE, CONSPIRACIES WERE PLACED BEFORE THE VENIREMEN? (KOTTEAKOS v. U.S., 328 U.S. 750)

2- WHETHER PETITIONERS WERE DEPRIVED OF A FAIR TRIAL AND DENIED DUE PROCESS BY THE "ROMAN CIRCUS" ATMOSPHERE WHICH THE TRIAL COURT PERMITTED TO DEVELOP WHEN IT ALLOWED THE DEFENDANT NETELKOS TO VACILLATE BETWEEN TRIAL WITH COUNSEL AND WITHOUT, DURING WHICH LATTER INTERVALS HE REPRESENTED HIMSELF? NOT BEING A LAWYER, HIS CONDUCT OF THE PROCEEDINGS WERE PREJUDICIAL AND A MOCKERY OF JUSTICE. (Fifth Amendment)

3- WHETHER THE COURT CREATED A MIS-TRIAL WHICH PRECLUDED FURTHER PROCEEDINGS UNDER THE DOUBLE JEOPARDY CLAUSE WHEN, WITHOUT CONSENT OF THE PETITIONERS, IT EXCUSED JUROR NUMBER 3 DURING THE TRIAL WHEN IT DEVELOPED THAT SHE WAS RELATED TO A WITNESS AND PROBABLY TO THE DEFENDANT NETELKOS? [COUNSEL SOUGHT IN VAIN TO HAVE THE UNITED STATES ATTORNEY NAME ITS WITNESSES WHEN THE JURORS WERE BEING SELECTED SO AS TO AVOID JUST SUCH AN EVENTUALITY.] (Fifth and Sixth Amendments)

4- WHETHER THERE WAS AN IMPROPER AMENDMENT OF THE INDICTMENT BY THE COURT WITHOUT ACTION OF THE GRAND JURY WITH RESPECT TO THE HYPOTHOCATION COUNTS? (Ex Parte Bain, 121 U.S. 1, 12; Stirone v. United States, 361 U.S. 212; Russell v. United States, 369 U.S. 749, 769)

5- WHETHER PETITIONERS WERE DEPRIVED OF A RIGHT OF CONFRONTATION BY VIRTUE OF THE FACT THAT THEY COULD NOT CROSS-EXAMINE DEFENDANT NETELKOS WHO IN ESSENCE "TESTIFIED" WHILE ACTING AS HIS OWN ATTORNEY BY THE MANNER AND CONTENT OF HIS QUESTIONS? (Sixth Amendment; Bruton v. United States, 391 U.S. 123)

6- WHETHER THE FAILURE OF THE GOVERNMENT TO TURN OVER CERTAIN FIELD NOTES AND NOTES OF THE PROSECUTOR FOR USE OF SEVERAL PETITIONERS ON CROSS-EXAMINATION DEPRIVED THEM OF A RIGHT OF CONFRONTATION AND DUE PROCESS? (Fifth and Sixth Amendments)

7- WHETHER PETITIONERS RECEIVED A FAIR TRIAL? (Fifth Amendment)

8- WHETHER THE SO-CALLED "ALL - or NOTHING" CHARGE THAT THE JURORS MUST FIND ALL THE CONSPIRATORS GUILTY OR NONE, PRECLUDED A FAIR TRIAL? (Fifth Amendment)

9- WAS IT ERROR IN A VERY LENGTHY TRIAL TO REFUSE TO MARSHALL THE EVIDENCE FOR THE JURY?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments and 18 U.S.C. §§371, 1001 and 2; 15 U.S.C. §§78h(c), 78j(b), 78q(a), 78ff(a); 17 C.F.R. 240.8c-1, 240.10b-5, 240.17a-3, and

240.17a-5 are all involved herein.

STATEMENT OF THE CASE

The case lasted many weeks and a plethora of evidence was adduced concerning not one, but several conspiracies. The Petitioners herein, hereinafter sometimes called the "Appellants" or "Defendants" where we advert to others in the case, were made to run a gauntlet of evidence which pertained to Netelkos or one of the other Appellants. In several instances, the trial Court charged that such evidence was not binding on the Petitioners herein, and yet the jurors were expected to perform the mental gymnastic of segregating that from so-called relevant testimony as to the charges in the indictment.

The evidence adduced consisted of 30 volumes of testimony and innumerable exhibits.

INTRODUCTORY

We shall present several reasons for granting Certiorari herein. We ask, however, that this Court bear in mind that one of the significant aspects of this case is that it originally comprised 125 Counts and was so complex and prolix that it is incredible to believe that any lay jury could possibly have understood the complicated rules of law to be applied or for that matter the plethora of technical testimony that was adduced.

We maintain that, far from seeking to prove a single conspiracy, the government sought to establish several, 13, separate conspiracies. The case should have been broken up into several separate cases, each of which would have been far more coherent and manageable than the "Chinese jig-saw puzzle" into which this litigation degenerated.

The Court finally realized that the

jurors would be faced with about 600 separate verdicts if the indictment was not consolidated. The Court, however, did not winnow down the charges until virtually the very end of the evidence and finally proselytized the reluctant prosecutors into a 34-count indictment, consisting of the conspiracy count and 33 overt acts thereunder which the Government insisted were separate substantive crimes. It was manifest that without the overt acts, there could be no conspiracy at all. Thus, we maintain that the Court should have granted the motion to consolidate all of the languate of the indictment into the conspiracy charge itself.

The rather transparent motive of the Government was to overwhelm the lay jurors and thus gain a tactical advantage by the very prolixity and enormity of the charges.

Santoriello was kept in the case

on the conspiracy charge, although it is patent that the proof was completely lacking against him as to any of the several conspiracies alleged. His name was scarcely mentioned in the proof and it was manifest that he held a purely ministerial job as cashier. His title as President of Carlton Cambridge Corp. (sometimes referred to as C.C. hereinafter) after it had ceased to function for all intents and purposes was of no significance since he performed no meaningful duties in that capacity. The trial Court itself was hard-pressed to keep him in the case.

The overt acts of the conspiracy which the Respondent claimed were the substantive counts embraced: (A)-The unlawful hypothecation of customers' fully paid securities (counts 2-8). (B)-The sellout of customers' securities (counts 9-13). (C)-Keeping false books and records in regard to trial balances and the general

ledger (counts 14-28). (D)-False statements made to the S.E.C. in respect to the loans by American Bank and Trust Co. (ABT) to Christian-Paine Corp. (hereinafter sometimes referred to as C.P.) (counts 29-33). (E)-The alleged filing of a false report on April 30, 1973, Form C-17A-5, with the S.E.C. (count 34).

The period of the conspiracy allegedly persisted during the interval of January 1972 to April 10, 1974.

The evidence adduced revealed a number of disconnected incidents which were at best separate conspiracies, but certainly were not within the purview of the indictment.

The Court permitted testimony as to Netelkos' burning of Christian-Paine records <u>after the conspiracy terminated</u>, and obviously without the knowledge or approval of the Petitioners herein. This act should have been kept out of the trial

but was admitted. The Court itself compounded the error by ruling that it was admissible against Netelkos only.

The Court also admitted testimony about an incident which occurred after the conspiracy which involved an assault by Netelkos against Kimmell, an NASD examiner, at a place far removed from C.P. and after termination of the conspiracy.

Neither of the foregoing incidents were even mentioned in the indictment and were, therefore, very prejudicial against the Petitioners herein. No jury could perform the mental gymnastics necessary to redact these dramatic events from the context of the trial of the others.

The statements uttered by Netelkos in these and other events, both before and after the conspiracy, were in essence "Bruton" errors since Netelkos did not take the stand in his own defense. They were not conspiratorial utterances.

An extremely serious problem created by the Court's refusal to grant severances to the Petitioners herein developed when, early in the trial, Netelkos insisted on trying his own case and cross-examining witnesses. His attorney, Thomas DeClemente, a hard-working, but inexperienced lawyer, protested that the Court was forcing him to remain in the case even though he had not been paid and despite his annoyance and frustration at being compelled to sit and advise Netelkos.

The trial degenerated even more into a Roman Circus when Netelkos intermittently "abdicated as his own counsel" and let DeClemente examine, and then came back later and resumed the role of attorney when the mood suited him.

The trial judge, apparently unable to cope with this dilemma, merely let Netelkos do what he pleased in this regard and thereby aided and abetted the farce

that was being perpetrated.

Gamarekian's defense was sorely impaired by the actions of the trial judge who found his lawyer, Mr. McAlevy, in contempt and fined him a substantial sum of money at the beginning of trial because he had "permitted" himself to be forced into another case by a State Court judge. McAlevy protested that the matter was out of his control, but the trial judge below ordered all counsel into Court, and on the record, rather than in camera, publicly chastised McAlevy and in effect conducted an in terrorem proceeding so that all counsel would be wary of striking the ire of this magistrate. Not unexpectedly, the media reported the affair.

McAlevy was told further during the trial that a State disciplinary body had ordered the report of his contempt proceeding. He and the judge became embroiled in numerous verbal duels with the Court.

It is clear that McAlevy was not as effective as he could have been, and Gamarekian no doubt suffered thereby. A severance should have been granted to Gamarekian; or nothing regarding discipline should have been done until the trial was over.

In the beginning of trial, counsel for the defense unsuccessfully sought to elicit the names of prospective witnesses so that jurors could be selected without the possibility of later challenge. As luck would have it, when an important Government witness, Nieradka, was called to testify, Juror number 3 notified the Court that she was his first cousin and in turn it was revealed that she was probably also related to Netelkos, who was a relative of Nieradka. Over protests, the Court excused Juror number 3. We maintain that this created a mistrial since a sworn juror was excused without the consent of the defendants and without any fault of the appellants.

The Government really conducted a trial by ambush since it failed to reveal important notes and material prior to cross-examination and in numerous instances gave pre-trial discovery material to the defense during the trial itself.

The amount of material amassed by the Government was tremendous and was in a warehouse. Without pinpointing important material, it would be and was impossible to ferret out material needed for cross-examination.

Most serious was the abdication by the Court of its responsibility to rule on the existence of multiple conspiracies. The Court left it as a jury question. Clearly, the jurors were not equipped for this ruling which should have been made as a matter of law. The jurors, laymen all, were in the box for about two months and had an incredible mass of evidence adduced for their perusal. They were given instruc-

tions in law that lawyers would have had difficulty in deciphering. And to top this off, the Court let them decide the complicated issue of "multiple" conspiracy when the theory of conspiracy itself is one of the most difficult of all conceptions in a criminal case.

None of the Petitioners were previously convicted of any crime. Santoriello was the cashier of the firm, Christian-Paine, and had nothing to do with the alleged crimes. Even the Court came close to dismissing his indictment. Santoriello held the title of President of Carlton Cambridge after it went out of existence, but his duties were purely ministerial since the firm was dormant when he took that post.

Rega was President of Christian-Paine and was a sales promotion specialist. He built the business from virtually nothing into a 25,000-account firm. He had outstanding credentials in the community which

the Court can discern in the record. He took the stand and stated that he was in the field 85% of the time. He did not know the working of the back office and relied on reports given to him which he in turn gave to the regulatory agencies.

He, like Gamarekian, was strongly under the influence of Netelkos, who wielded uncanny power over everyone. Rega produced character witnesses who attested to his outstanding character and honesty.

Gamarekian was a very young man when he was hired in late 1968 by Netelkos. He had recently graduated college receiving a B.S. degree. He had been President of Carlton Cambridge, but in 1971 resigned and Rega took over, later changing its name to Christian Paine.

Gamarekian denied any wrongdoing and also indicated his "Manson-like" attachment to Netelkos. He had been ill and had been in Mexico for a long period of time

during the alleged conspiracy. He worked as a computer consultant at C.P. since C.P. had no computer to handle its burgeoning business. The "back-room" had scarcely been enlarged despite a huge increase in accounts.

The trial Court was made aware of the fact that the proposed evidence of the Government would conflict with their theory of a single conspiracy. This was done early in the trial and before any evidence was even adduced.

A pre-trial motion for severance had been denied, but motions were made after the opening of the prosecutor for a severance again, and were still denied.

At 109 through 114 of the record, before the Government had even finished its opening, and at a time that the Court could have prevented some of the prejudice from even coming in, counsel objected that the Government was indicating that there would

be proof of destruction of Government exhibits, theft and spoliation of evidence despite no such charge in the indictment (109).*

The Court rejoined (110):

> "THE COURT: No. Wait a minute, Mr. Anolik. ... you didn't let your adversary get very far into the subject matter.
>
> "MR. ANOLIK: I'm trying to avoid the mistrial, your Honor. That is why I didn't feel it should go further. ... (111) I'd like to preserve the objection. If they cannot in fact establish that any defendant here did it, at the appropriate time I'll make a motion for a mistrial."

Counsel was told that the Government would show that Christos Netelkos did these things, but the defense pointed out that the Government was talking about a time apparently after the conspiracy terminated.

"THE COURT: If that were so,

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*Numerals in parentheses refer to pages of the officialcourt reporters' minutes of trial, unless otherwise indicated.

it would only be attributable to the individual defendant that did it. ... I would give a limiting instruction if the evidence does show it. I can't give it now.

"MR. ANOLIK: Right, your Honor. You can appreciate...your Honor, if they introduce such evidence I will move for a mistrial because it will be very prejudicial. ... I ask your Honor to consider Kotteakos..." (Kotteakos v. United States, 328 U.S. 750 (1946). (113)

"THE COURT: Kotteakos is separate conspiracies. (114)

"MR. ANOLIK: That's right. ... I didn't want it to be said that I didn't alert your Honor at the proper moment.

"THE COURT: Fair enough." (114)

At 116, the prosecutor, unmindful of the colloquy, went right ahead and adverted to Netelkos' burning of the evidence in Paramus.

At 150 of the record, counsel made a formal motion again for a severance which was denied (150-151). The Court cautioned the prosecutor not to try his case by

"ambush", an admonition which unfortunately fell on deaf ears.

The Court also allowed evidence of an assault by Netelkos upon the NASD examiner, Kimmel, on May 10, 1974 which was way after the conspiracy (688-690). The Court held that it was admissible only against Netelkos, but how can a jury segregate such volatile material from their minds in such a protracted case?

The statements attributed to Netelkos at this incident and at all others including the Horvat testimony, were violations of the Bruton Rule since Netelkos never took the stand, but he was quoted.

Netelkos was permitted to examine Kimmel whose testimony was damaging since he indicated that evidence was being suppressed and kept from the NASD. Netelkos also interrogated Frank, who worked at ABT (American Bank and Trust Co.) who had made loans to C.P. In his questions, Netelkos

was in essence permitted to testify in effect by asking first person questions (1405-6).

As one of the several examples of unfair trial-by-ambush tactics of the prosecutor, the trial assistant said that a Mr. Basalotta of A.B.T. would testify, so the Court, therefore, over objection, permitted Kimmel to tell the jury that Basalotta had said that Rega had given written instructions not to allow any regulatory agencies to gain access to information without his (Rega's) permission (1142-1144).

As it turned out, Basalotta never testified and the Court later had to give an instruction that the jury disregard this damaging evidence which appeared to be an effort to "cover up".

Gerhard Frank, the operations officer at A.B.T., was permitted to testify that certain reports allegedly produced by Christian Paine as coming from A.B.T. were

not typed by typewriters at A.B.T. and that the paper was different as were the signatures (1356-1366, 1380). This was despite objections that Frank was not qualified as an expert and that the Government had not supplied results of any tests or experiments as required by the demands for discovery under Rule 16, F.R.Cr.P. (1414, 1415).

The Government never alerted the defense as to this proposed "expert" testimony and the Court refused a continuance to the Petitioners to have their own tests made.

POINT I

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED SINCE THE GOVERNMENT ADDUCED PROOF OF SEVERAL, NOT A SINGLE CONSPIRACY, THEREBY COMMITTING THE ERROR OF VARIANCE. SINCE THE INDICTMENT CHARGED ONLY ONE CONSPIRACY, THE JUDGMENT CANNOT STAND IN VIEW OF THE ADDUCTION OF PROOF CONCERNING MULTIPLE CONSPIRACIES.

When convictions have been obtained

on the theory that the Petitioners were members of a "single" conspiracy although, in fact, the proof discloses multiple conspiracies, the error of variance has been committed. Berger v. United States, 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946). See, Note, Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387, 396 (1957).

While Courts have gone far in upholding the theory of single conspiracy, it is manifest that there must be a point at which the Government must stop utilizing the conspiracy device (sometimes called "the darling of the prosecutor's nursery") to adduce evidence of many conspiracies when only one is charged.

In United States v. Bertolotti et al., 529 F.2d 149 (2 Cir. 1975), the Court of Appeals in the Second Circuit rejected the premise of a single conspiracy when clearly more than one was evident.

We assume arguendo, that the jury was warranted in finding that each of the asserted transactions took place. There is no evidence linking them together into a single over-all conspiracy. (United States v. Miley, 513 F.2d 1191, 1205 (2d Cir. 1975); United States v. Butler, 494 F.2d 1246, 1255 (10th Cir. 1974).

Indeed, the only common factor linking the transactions, at least most of them, together, was the presence of Netelkos. This type of nexus has never been held to be sufficient. United States v. Kotteakos, supra, at 773, 774.

Netelkos ran several businesses and corporations of his own which had nothing to do with the other alleged members of the conspiracy set forth in the indictment. (See United States v. Miley, supra, at 1207.)

"The scope of the operation was defined only by [Netelkos'] resourcefulness

in devising new methods to make money [for himself]", Bertolotti, supra.

It is clear that the Government has merely merged several conspiracies for the sake of convenience and to gain the tactical advantage of injecting additional schemes into the case to overwhelm the talismen. (United States v. Butler, supra, at 1256.)

The "spill over" effect is so damaging as to preclude a fair trial and the variance requires a reversal. Miley, supra, at 1209; Kotteakos, supra, at 774. "The true inquiry", as stated in Berger, "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused," 295 U.S. at 82. No wonder conspiracy has been described as the "darling of the prosecutor's nursery."

The instant case contained 125 counts and 7 defendants on trial, and

several co-conspirators, such as Lowick, Maniscalco, Horvat, Kolano, Frank, and perhaps others. Not all were indicted, but clearly were alleged co-conspirators.

Berger involved only four defendants. In Kotteakos, 13 defendants ultimately went to trial. In Miley, a case involving two and perhaps three conspiracies, only 5 proceeded to trial and the trial lasted only 5 days.

In the case at bar, there were at least ten persons indicted and other alleged co-conspirators. Seven went to trial. The trial lasted about two months and consumed about 30 volumes of testimony and colloquy, plus numerous exhibits.

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." United States v. Kotteakos, supra, at 762.

We turn, therefore, to a considera-

tion of the trial below.

In dealing with separate conspiracies, we also advert to acts done outside the scope of the instant conspiracy alleged in the indictment.

First Conspiracy: Netelkos, in a conversation with Horvat and Maniscalco, according to the testimony of Horvat, proposed in early October 1973 a way to make money. Horvat testified (3999-4002):

"BY MR. WALSH:

Q. And, sir, after this meeting, did you receive anything from Mr. Netelkos? A. Yes, I received a loan for about $14,000.

Q. Approximately when did you receive this loan, sir? A. Shortly after that. A week or two.

Q. Could you give us the month, sir? A. I would say October, 1973.

Q. And, sir, did you ever make that underwriting or did you ever sell that stock to the public? A. No, sir, never. It was never consummated.

Q. And, sir, did you have a meeting with Mr. Netelkos thereafter? A. Yes, I did.

Q. Could you tell the jury about it?

MR. ANOLIK: Fix a date, your Honor.

THE COURT: Approximately when was this meeting?

THE WITNESS: Early October, 1973.

Q. And where was it held, sir? A. It was at our offices at 205 North Washington Avenue, Bergenfield.

Q. Sir, who was there? A. Mr. Netelkos, Mr. Maniscalco and myself.

Q. And, sir, could you tell us what all parties to that conversation said?

MR. ANOLIK: Objection, your Honor.

Q. Would you tell us about that conversation that you had in early October with Mr. Netelkos and Mr. Maniscalco? A. Yes. Mr. Netelkos came over and he said -- first he said -- 'You know, you owe me money. You'll have to pay me back.' I said, "Sure I know, but right now we don't have any money.' Then he said, 'Well, I have a plan that if you go along with it, in 90 days or so you can -- the firm can make substantial amount of money. $100,000 or more.' And he explained the plan. He said, 'The market is going down and that if we get involved in

selling listed securities we could short stocks to the customers and cover them in some future date at a lower price and keep the difference.' And I said, 'You are probably right, but what happens if it backfires and if the market goes up?' He said, 'Well, don't worry about it.' He said that, 'if that happens and if we are losing money,' he would have Christian-Paine bail us out.

MR. ANOLIK: I persist in my objection, your Honor, and ask that it be stricken.

MR. McALEVY: I would join with that, your Honor, on behalf of my client.

THE COURT: I'll see counsel very briefly at side bar."*

At 4008-4009, Horvat recalled that Netelkos told him that if the market went up and Horvat-Maniscalco lost money, "Gamarekian has a million dollars in the bank at Christian-Paine and if anything happens, I'll bail you guys out." He further told Horvat to buy out a limited partner they then had, Ray Friesinger.

Netelkos told Horvat that their

*The Court would not strike the testimony.

firm, Horvat-Maniscalco, would have to have a separate set of books so that the regulatory agencies would not see what was going on (4012).

Second Conspiracy: Horvat testified that on April 6, 1974, Netelkos said "Rega is dead. They won't be able to self-liquidate. SIPC is taking over."

Horvat exclaimed that his firm was looking at "a hole of $400,000. What are we going to do?" (4082-83)

Netelkos said he was going to "bail everyone out."

Horvat continued, "Also, we mentioned about putting a claim in to SIPC on each account for $50,000 each."

"Q. Who suggested that, sir?
A. Mr. Netelkos.

"Q. Did you say anything?
A. Yes, I said, 'How could you do that? If you put the claim in with SIPC, you wouldn't be able to prove where the money came from and the whole thing would be exposed.'" (4082-84)

Third Conspiracy: Horvat later

testified that subsequently Netelkos came over to their offices with boxes and started a bonfire wherein he was burning records of Christian-Paine (4084-85). Horvat admitted that he helped carry some cartons to the fire (4084). Motions for mistrial were denied.

Horvat further explained that Netelkos had given Horvat-Maniscalco about 2000 signature cards from C.P., so Horvat-Maniscalco could solicit these customers away from C.P.

These cards could have proved incriminating so Horvat and Maniscalco conspired with Netelkos to shred these cards, which they did (4086-4091).

There was a second fire when records were burned also (4108). This was after April 10, 1974 which was the terminus of the conspiracy in the indictment.

[In many cases, there were conversations admitted outside the charged con-

spiracy (1600-1604; Horvat, etc.).]

Horvat testified on direct (4090):

"Q. Could you tell us what happened with those cards? A. Right around that time we started receiving calls from the SEC and I believe the State of New Jersey came around and the NASD and I overheard that they were trying to--

"Q. Just tell us what happened to those cards, sir. A. The cards were shredded in a paper shredder we had.

"Q. How did you come to put those cards through a paper shredder? A. I spoke to Mr. Netelkos about all the heat we were getting from the regulatory bodies and I also told him every time we open a drawer we find literature of Christian-Paine in that office. So he said, 'Well, we got to get rid of all this so there is no connection.' So we took the cards. We shredded them and we burned them.

"Q. You said you shredded them, sir? A. Yes.

"Q. What did you do after you shredded the cards? A. We put the shreds in a box and we took it outside and we put it in the dumpster container and set fire to it."

Fourth Conspiracy: Horvat testified

that Netelkos had a company known as American & Company which he used to channel money in and out of C.P. for Horvat-Maniscalco. Then in April 1974, Netelkos gave him a check for $50,000 which bounded and Netelkos said he would make it good. It was a check for funds coming out of other Netelkos companies, Washington investors and United Trading (4017-18).

Fifth Conspiracy: This involved Horvat's admission that Netelkos brought a computer from C.P. to Horvat-Maniscalco and that it was hidden there (4108-4112). He agreed to hide it.

Sixth Conspiracy: Horvat stated that Netelkos subborned perjury by plotting with him to have Horvat deny that Netelkos was on the premises of Horvat-Maniscalco with Nieradka on April 6, 1974 (4128-30). Horvat received a grand jury subpoena and told Netelkos. The latter told him to lie to the grand jury about the computer which

he did (4132-35).

The Court itself realized that the evidence was not relevant to the case, so it instructed the jury to use it only against Netelkos (4134). This mental gymnastic in such a long and complicated case was clearly impossible (Bruton v. United States, 391 U.S. 123).

Seventh Conspiracy: Marie Kolano, the office manager at Carlton Cambridge and Christian-Paine, was originally hired by Netelkos. She did not get along with Rega at all and at one occasion refused to approve an expenses check for him until she got an O.K. from Gamarekian, even though Rega was then President of C.P.

She was not happy with her salary, but since she could not get a raise, she spoke with Gamarekian and a scheme was worked out whereby she would pad the expenditure of "office expense" and take that money for herself (2848-53).

This continued until she left the firm. This was clearly unknown and unapproved by Rega, so he could not possibly have been part of that scheme to embezzle money from the firm in this manner and perhaps enable Kolano to evade taxes.

Gamarekian himself took payments from the company after he stepped down as President of C.C. in the form of vouchers or reimbursed American Express charges. He said that he had worked this out with Rega, but even if true, it was certainly a conspiracy to secure money from the company without the knowledge or approval of the alleged other members of the conspiracy charged (5223-5225).

In no event were the Kolano or Gamarekian payments charged in the indictment.

Eighth through Twelfth Conspiracies: These conspiracies are the five mentioned in the indictment.

Eight is the alleged unlawful hypothecation of customers' securities. Even assuming that Netelkos, Gamarekian and Rega knew of this, and we do not concede the evidence so shows, certainly Santoriello, Ditta and Ysrael could not have participated therein (Counts 1, 2-8).

Nine relates to the unlawful sell-out of customers' securities (Counts 1, 9-13). Here, while Ditta was the trader, certainly Santoriello and Ysrael could not have participated in this alleged scheme. Hall was apparently a co-conspirator, too, since he was aware of duplicate lists, as was Kolano.

In addition, Horvat and Maniscalco were obviously meant by the prosecutor to be considered co-conspirators as well. Yet how could they have participated in the various allegations of the indictment herein, such as hypothicating customers' securities; filing a false report with the

S.E.C. and so forth?

Ten was the keeping of false books and records in regard to trial balances and the general ledger (Counts 1, 14-28). It is not conceivable that Ditta, who was the trader, could have participated in this.

Eleven involved false statements made to the SEC in respect to loans made by ABT to C.P. (Counts 1, 29-33). Here, too, how could Ditta, Santoriello, and Horvat and Maniscalco have participated in this scheme?

Twelve involved the filing of a false report on April 30, 1973, Form C-17A-5, with the SEC (Count 1, 34). Ditta and Santoriello could hardly have been involved in that scheme. The complicity of Kolano, Horvat and Maniscalco could scarcely be deemed established either.

Thirteenth Conspiracy: This conspiracy involved the Estate of Daniels which is the whole substantive count in

which Pascall was mentioned. While the Court ultimately did not submit this count to the jury, Pascall was only severed from the case as was Ditta. Their conspiracy counts were not dismissed. The jury, however, heard a tremendous amount of testimony about the Estate of Daniel and obviously they should not have.

We submit that even if the Court disagrees that each of the foregoing thirteen categories are not separate and distinct conspiracies, certainly it must agree that more than one conspiracy was presented to the jury. In a case as long and complicated as this, with so many alleged co-conspirators, the jury could hardly be expected to determine the existence of one or more conspiracies. The concept of conspiracy is clearly a difficult one even for lawyers. The Court should not have presented the issue to the viremen.

See United States v. Taylor (2 Cir. 1972), 464 F.2d 240 at 242.

It should be noted that the Court never read the indictment to the jury.

In such a complicated case, we submit that it was impossible to obtain a fair verdict. The Court should have dismissed as requested.

We, therefore, maintain that the judgment of conviction should be reversed as to each defendant on the ground of the error of variance in that more than one conspiracy was presented to the talismen. The trial Court could not abdicate its responsibility by leaving the issue of multiple conspiracy to the jurors. (United States v. Taylor, supra.)

POINT II

THE PETITIONERS WERE DENIED A FAIR TRIAL SINCE THE CASE WAS IN ESSENCE TRIED BY "AMBUSH". FULL DISCLOSURE IN A CASE AS LONG AND PROLIX AS THAT HEREIN WAS ESSENTIAL, BUT WAS OBSERVED IN THE BREACH, MORE THAN IN THE PERFORMANCE.

The case herein was one of the longest securities cases tried in New Jersey and included a huge number of exhibits, many witnesses, and consumed about two months' time to try.

At the very outset, the defense asked whether the Government would claim that the so-called "Net Capital Rule" was violated [8(b) Securities Exch. Act 1934, 15 U.S.C. 78h(b); 17 CFR 240.15c 3-1]. The Government refused to answer and the Court declined to direct them to do so (item 7i, 7j of Rega's demand for particulars).

Yet, early in the trial, Kimmel of the NASD suddenly declared that Christian-Paine was in violation of this net capital rule (420-427). A motion for mistrial was

denied. Counsel explained that different preparation would have been conducted had he known of this (425-427).

The so-called net capital rule is complicated and excellent effects of a prepared cross-examination would have helped the defense immeasurably had they been prepared for it.

There was no proof that Christian-Paine was ever in violation of the net capital rule.

A demand had also been made for all 3500 (18 U.S.C. 3500) material. Yet when the important witness Kimmel testified, counsel learned from him for the first time that his field notes which had been turned over to the United States Attorney had not been given to the defense. Again the Court denied a motion for a mistrial and merely told the Government to turn it over (870-880).

The witness Kimmel was most important

and different approaches might have been used in preparing to examine him had the Government complied with the requirement. The Supreme Court branded this as error in Goldberg v. United States, 425 U.S. 94 (1976).

A.

IMPROPER EXPERT TESTIMONY

The demand for discovery included a Rule 16 (F.R.Crim.Proc.) request for results of all tests, scientific investigations, etc. The witness Gerhard Frank, although not qualified as an expert, was permitted to testify that certain reports obtained from C.P. were not genuine and that there had been different typewriters use, and different paper and different signatures employed (1337; 1405-1519). A vehement protest and motion for a mistrial was made and denied. The Government had known of this proposed "expert" testimony several days

in advance, but did not alert counsel and chose to continue their ambushing tactics.

While the Court may exercise discretion in the recognition of an expert (United States v. Akler, 260 F.2d 135, 155 (3d Cir. 1958), cert. denied 353 U.S. 974), they must be men of experience in the field in which they claim such expertise (Bush v. McCollum, D.C. Tex. 1964, 231 F. Supp. 560, aff'd 344 F.2d 672 (5th Cir. 1965)--holding that a general practitioner could not testify on a specialized branch of medicine; Holm v. United States, 325 F.2d 44 (9th Cir. 1963); Rule 702, Fed. Rules of Evidence, a witness must be "qualified as an expert by knowledge, skill, experience, training or education...". (Cf. Rule 28, F.R.Crim.Proc.)

Frank's testimony was very damaging as an "expert" since it indicated that the defendants committed forgeries, altered ABT reports, substituted different paper for

reports to change them, and even used typewriters outside of ABT. The colloquy indicated that the Court did not understand what "expert" witnesses really are. Otherwise he would not have permitted this testimony of Frank with no pretense at any qualification (1343-1359; 1360-1380; 1415-1419). (1415):

> "THE COURT: I think the basis and spirit of my ruling is that such matters are within the ken of people who are not experts, just as one may testify as to whether another is drunk, just as one may testify to the speed of an automobile without being an expert, so, too, it is common legal principle and acceded to by you earlier that one can testify as to handwriting...
>
> "MR. ANOLIK: Yes, your Honor. But I do not predicate it upon handwriting of a fellow employee, your Honor. I am predicating it upon the typewriter, the paper and his statement ex cathedra, so to speak, that this is not from American Bank & Trust Company. Not, mind you, your Honor -- he went beyond his original testimony because of Mr. Braniff. Originally he was saying it wasn't from the Clearance Department. Then he expanded and said it wasn't from ABT altogether."

On several occasions, the prosecutor did not turn over his own notes dealing with the trial and preparation of witnesses, claiming they were not 3500 of "Brady" material. The Court did not compel disclosure, but held them as Court exhibits, e.g., 1432, exh. C-5; 871-Kimmel, etc. We ask that this Court review all of the Court exhibits, which contain the prosecutor's notes, to see if they should have been turned over. We have not yet seen them. Failure to turn over 3500 material is error.

Kimmel had said he'd seen a large check payable to Gamarekian, but he admitted later he erred (664). (See Goldberg v. United States, supra.)

POINT III

THE COURT IN ESSENCE CREATED A MISTRIAL BY EXCUSING JUROR #3 DURING THE TRIAL OVER THE OBJECTIONS OF THE DEFENSE AND THROUGH NO FAULT OF ANY DEFENDANT. THE GOVERNMENT WAS CLEARLY RESPONSIBLE SINCE, CONSISTENT WITH THEIR "AMBUSH" TACTICS, THEY REFUSED TO NAME THE PROSPECTIVE WITNESSES. AS A RESULT, JUROR #3 DISCOVERED SHE WAS A FIRST COUSIN OF THE PROSECUTION WITNESS NIERADKA, AND PROBABLY RELATED TO NETELKOS WHO WAS ALSO RELATED TO NIERADKA.

In its trial strategy, the Government, as we have shown, supra, chose to disclose as little as possible to the defense. They were asked to name the witnesses who would testify, but did not do this.

As it turned out, due entirely to the Government's calculated design to withhold anything helpful to the defense, when the witness Nieradka was called by the prosecution, juror number 3 declared that he was her first cousin and therefore was excludable for cause. The defense asked

for a mistrial and there was no consent to discharging her. Nevertheless, the Court replaced her with an alternative.

Such tactics of withholding the names of witnesses was condemned as "trial by ambush" in United States v. Baum, 483 F.2d 1325 at 1331, 2 Cir. 1973. See, too, United States v. Kelly, 420 F.2d 26, 29, 2d Cir. 1969.

Counsel had pointed out that jurors would not know if they knew prospective witnesses unless their names were disclosed. The Government did not even do this in its opening.

And, the Third Circuit, while noting that a list of the Government's prospective witnesses may be denied to a defendant, said:

> "Where, however, a defendant seeks legitimate information, he may not be denied it merely because the effect of providing it is to divulge the names of the government witnesses or the details of the government's evidence.

[Cits. Omit.]" United States v. Addonizio, 451 F.2d 49, 64 n.16 (3d Cir. 1972). (Emphasis in original).

There was no reason advanced as to why the names of witnesses were not given. The juror indicated that she would have instantly recognized the name if it had been mentioned. The discharge of the juror over objection was ordered by the Court (3413; 3432; 3448-3464; 3435; 3463).

In United States v. Ellenbogen, 365 F.2d 982, 989, 2 Cir. 1966, cert. denied 386 U.S. 923, the Court held that consent of the parties is not required where substitution is for "reasonable cause". This event, we maintain, was not reasonable, but was precipitated by the Government's covert manner of trying its case by ambush.

Nor is this case like United States v. Goldberg, D.C. Pa. 1962, 206 F.Supp. 394, aff'd 330 F.2d 30, 41-43, 3d Cir. 1964, cert. denied 377 U.S. 953, where a juror

was chosen by mistake due to an identical last name as the juror desired by the parties. There, unlike here, there was a mistake which was not due to the withholding of information by one of the parties. In the instant case, the incident was avoidable. What if five jurors in the long case involving many witnesses had been related to various witnesses? The Government took a calculated risk and lost. It will only encourage such tactics again to ignore and condone this event.

A demand for particulars had been made but most of the items were denied, even though they were clearly proper (See Rega memo in support of particulars).

POINT IV

THE CASE SHOULD BE REVERSED SINCE THE COURT BELOW REFUSED TO GRANT A MOTION TO DISMISS THE HYPOTHECATION COUNTS (1, 2-8) OF THE INDICTMENT. THE INDICTMENT DID NOT SAY THESE HYPOTHECATED SECURITIES WERE FULLY PAID FOR; NOR DID THE GOVERNMENT PROVE THAT A CRIME HAD BEEN COMMITTED. THE COURT MISINTERPRETED THE 1934 SECURITIES EXCHANGE ACT (15 U.S.C. 78h).

The indictment herein was sloppily drawn and was a hodgepodge of redundant allegations. There was no charge concerning Horvat and Maniscalco or the Kolano embezzlements, nor the fire or destruction of records by Netelkos and Horvat. Motions had been made to dismiss because the prosecution was asking for what amounted to an amendment of the indictment to prove its case. The Court, perhaps concerned that so much effort, albeit wasted, had gone into the case, in each instance ruled in favor of the admission of improper evidence, several instances of which we have already detailed supra.

It is submitted that the counts relating to hypothecation (charging Rega and others with violating Title 15 U.S.C. §78h and regulations promulgated thereunder -- the rule which forbids the hypothecation by member firms of customers' securities in certain circumstances) and portions of Count 1 (charging Rega and others with conspiring to violate the hypothecation rules) fail to allege an essential element of the crimes charged, to wit, that the securities purportedly hypothecated or agreed upon to be hypothecated were for a sum exceeding "the aggregate indebtedness of all customers in respect of securities carried for their accounts." These counts allege only that customers' securities were hypothecated, but do not even make any pretense at specifying whether the alleged hypothecation was in excess of the "aggregate indebtedness." The allegation that "securities" were hypothecated is not the same

as an allegation that the total amount hypothecated at any one time exceeded the aggregate indebtedness of all corporate customers on all of their securities at that time.

It is further submitted that an inspection of the grand jury minutes will reveal we believe, that there was no evidence before the grand jury that the aggregate indebtedness of all corporate customers in respect of securities carried for their accounts exceeded the amount of the hypothecation. Accordingly, the hypothecation counts and Count 1 insofar as it charges a conspiracy to violate the hypothecation rule, are defective on their face as well as being unsupported by any grand jury evidence and must be dismissed.

Section 8 of the Securities Exchange Act of 1934 (15 U.S.C. §78h) makes it unlawful, inter alia, for any broker or dealer:

"In contravention of such rules

> and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances * * * that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities." (Emphasis supplied)

Pursuant to the authority delegated by the statute, the S.E.C. promulgated Rule 8c-1 (17 C.F.R. §240.8c-1) which purports to define the conduct made unlawful by the statute. The pertinent provisions of Rule 8c-1 are as follows:

> "* * * no broker or dealer * * * shall * * * hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances -- (3) that will permit securities carried for the account of customers to be hypothecated, or subjected to any lien or claim or claims of the pledgee or pledgees, for a sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts * * *."

Thus, although Section 8 of the

1934 Act arguably would permit the enactment of an S.E.C. rule proscribing the hypothecation of a particular customer's securities for a sum greater than the aggregate indebtedness of that customer on those securities, the existing S.E.C. rule--which defines the only conduct made unlawful by Section 8 of the Act--does not do so. The S.E.C. rule only limits the total amount which can be borrowed on customers' securities in relation to the total indebtedness of all customers on all of their securities.

In commenting on this very provision of Rule 8c-1, Ezra Weiss, Counsel to the New York Regional Office of the Securities and Exchange Commission, wrote in Registration and Regulation of Brokers and Dealers (BNA, 1965):

> "Paragraph (a)(3) of the rule. The Commission has under consideration the recommendation of the Special Study Report for rules requiring a 'reasonable relationship'

> between the amount of each customer's securities that can be hypothecated or lent by a broker-dealer and the amount of the particular customer's indebtedness. (Citations omitted.) The present rule is a restriction on the over-all amount which can be borrowed on customers' securities in relation to aggregate indebtedness of all customers." (Emphasis supplied)

The proposed rule change was never implemented and another proposed amendment has been pending since 1971 (see, CCH, Federal Securities Law Reporter, Vol. 2, §22,422, p.16, 306).

The hypothecation counts and paragraphs of Count 1 charge the hypothecation of "securities" and a conspiracy to hypothecate "securities." Again, the indictment absolutely fails to allege that the total amount hypothecated exceeded the aggregate indebtedness of all of the corporate customers on all of their securities--an essential element of the crime charged and defined by Section 8 of the 1934 Act (15 U.S.C. §78h) and Rule 8c-1 (17 C.F.R.

§240.8c-1).

That the securities allegedly hypothecated were "fully paid for," i.e., there was no indebtedness on "such securities," is irrelevant under the statute and S.E.C. rule. The mere hypothecation of fully paid for securities is not a crime under the sections alleged to have been violated unless the total amount hypothecated "exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts."*

It follows that the hypothecation counts and Count 1 insofar as it charges a conspiracy to violate the hypothecation rule, fails to charge a violation within the scope of 15 U.S.C. §78h and 17 C.F.R. §240.8c-1 and must be dismissed.

Because the indictment fails to

*There was no allegation in the indictment that the securities were fully paid for. Thus, presumably no such evidence was presented to the Grand Jury.

allege an essential element of the crimes charged, it is reasonably certain that the grand jury was presented no evidence of that element, to wit, that the total amount hypothecated exceeded the total indebtedness of all corporate customers on their securities. Such a failure of grand jury proof amounts to a violation of the appellants' Fifth and Sixth Amendment rights to be tried only on crimes of which he has been accused by a grand jury.

As the Supreme Court wrote in Russell v. United States, 369 U.S. 749, 769 (1962):

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him * * *."

The failure of the indictment to

charge an essential element of the crimes pleaded in the hypothecation counts and Count 1, and the probable lack of grand jury proof of that essential element requires their dismissal.

A bill of particulars or motion during the trial cannot amend an indictment. A person charged with crime had the right to be tried on that charge and none other.

The government ignored this precept in many instances as has been set forth already.

> Ex Parte Bain, 121 U.S. 1, 12 (1887); Stirone v. United States, 361 U.S. 212 (1960)

where the Court held that a variance between the indictment and the proof was fatal to the prosecution.

These cases were called to the Court's attention (150, 151).

In the case at bar, the prosecutor and Court just did not understand what

unlawful hypothecation was.

Francis T. Green, then the Assistant Director of the Trading and Exchange Division, Securities and Exchange Commission, on January 21, 1941 delivered an address on The Rules Governing the Hypothecation of Customers' Securities and Manipulation of Security Prices, in the Over-The-Counter Market.

He explained, in his discussion (at p. 7 of the reproduced report thereof):

> "The rules operate with respect to all securities which are 'carried for the account of any customer'. Consequently, the definition of this expression is of the very greatest importance since no security falling within this term can be hypothecated except under the circumstances permitted by the rule. 'Securities carried for the account of any customer' is defined to include three general categories: (1) Securities received by or on behalf of the broker or dealer for the account of any customer. This, of course, includes all securities bought upon the execution of brokerage orders regardless of whether the customer may have yet paid the broker all or any part of the purchase price. It also includes any

> other securities which are received into a customer's account; (2) Securities sold by the broker or dealer as a principal to customers as soon as the securities sold are earmarked or otherwise appropriated to a customer. Here let me interpolate to say that under the law of sales, when securities to fulfill the contract of sale are set aside or otherwise appropriated to the contract, the property in these securities is usually regarded as passing to the customer, unless a different intention appears. Therefore, as soon as you tag the securities sold to the customer with his name or put them in an envelope for him, or enter the certificate numbers, on the customer's ledger or to his account in your blotter or otherwise identify the particular securities which have been sold to the customer, they become securities 'carried for the account of' a customer for purposes of the rule and must be treated as customers' securities; (3) the third classification of securities 'carried for the account of any customer comprises securities sold, even though they are not yet appropriated, if the customer has made any payment on account, at least to the extent that the dealer owns and has received like securities * * *."

There was no proof below that even a single share of stock was (a) tagged as having been sold to a customer by placing

his name thereon or (b) placed in an envelope for him or (c) identified by a certificate number in either the customer's ledger or in the blotter or (d) otherwise identified with particularity. It was questioned below whether C.P. "received" securities purchased by its customers. We refer to hypothecated stock.

POINT V

THE COURT PERMITTED THE TRIAL TO DEGENERATE INTO A ROMAN CIRCUS BY ALLOWING NETELKOS TO ALTERNATELY REPRESENT HIMSELF AND THEREBY CONDUCT CROSS-EXAMINATION, AND THEN BE REPRESENTED BY COUNSEL. THIS PREJUDICED THE OTHERS SINCE NETELKOS IN SOME INSTANCES TESTIFIED IN ASKING QUESTIONS THUS VIOLATING THE BRUTON RULE SINCE HE DID NOT TAKE THE STAND TO BE CROSS-EXAMINED.

We have already adverted to the fact that Netelkos discharged his lawyer, DeClemente, but the Court insisted that the attorney remain to advise Netelkos, despite his complaints that his erstwhile client had not paid him.

When the mood suited him, Netelkos insisted that he be permitted to cross-examine witnesses, which in every instance the Court permitted.

Netelkos had no legal training at all and knew nothing of the rules of evidence or how to frame proper questions.

At 1405 of the record, Netelkos, examining Frank, asked questions in an argumentative way, injecting the fact that Rega was at a meeting with Netelkos, Frank, and Basalotta. He said Joseph Rega was the "owner" of the Christian-Paine account at ABT. This was indirect testimony. At 1419, Rega's counsel asked for a mistrial since he could not cross-examine Netelkos because he never took the stand. This violated the Bruton rule (Bruton v. United States, 391 U.S. 123).

This was also true with respect to conversations which Horvat testified to concerning Netelkos, many outside the ambit

and span of the alleged conspiracy.

CONCLUSION

THE PETITION FOR CERTIORARI OF EACH PETITIONER HEREIN SHOULD BE GRANTED.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

CHRISTOS L. NETELKOS, CHARLES H. GAMERIKIAN, JOSEPH J. REGA, JR., GEORGE SANTORIELLO, GEORGETTE YSRAEL, LUCILLE DITTA, ROSS W. PASCALL

(Crim No. 75-103 D.N.J.)

Argued October 18, 1976

Before SEITZ, *Chief Judge,* HUNTER and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by the appellants, to-wit, that the court erred in (1) refusing to decide as a matter of law whether the evidence showed multiple conspiracies rather than the single conspiracy charged in the indictment (2) admitting evidence which proved, if anything, multiple conspiracies rather than the conspiracy charged (3) admitting evidence which proved, if anything, a conspiracy to engage in activities not mentioned in the indictment (4) admitting evidence of a scheme to defraud the Estate of Wilfred Daniels in proof of the conspiracy count (5) failing to consolidate all of the indictment into the conspiracy count (6) failing to dismiss Counts 1-8 on the grounds that they did not charge all the elements of the offense (7) failing to dismiss Counts 9-13 on the grounds

that they did not charge activities which are criminal under the securities laws (8) allowing improper testimony by Gerhard Frank as to the authenticity of certain documents (9) failing to declare a mistrial on the grounds that the government did not timely furnish the defense with certain written notes, and never furnished a list of the witnesses it intended to call at trial, or confirmation of whether it would rely on the "net capital rule" (10) admitting evidence that Netelkos burned records of Christian Paine, and struck an examiner from the National Association of Securities Dealers (11) failing to adequately supervise Netelkos' pro se representation to ensure that his co-defendants would not be prejudiced (12) failing to declare a mistrial as to Netelkos on grounds of incompetency of counsel (13) failing to dismiss Count 1 as to Netelkos on the grounds that it exposed him to double jeopardy (14) improperly questioning witnesses and summarizing testimony (15) denying a request that it summarize the evidence and instruct the jury on the defendants' theory of the case (16) creating an atmosphere of intimidation (17) issuing a confusing and inadequate charge to the jury (18) imposing excessive sentences (19) failing to disqualify itself, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

SEITZ
Chief Judge

Attest:

/S/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

Dated: Nov. 12, 1976

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-1192/4

UNITED STATES OF AMERICA

v.

CHRISTOS L. NETELKOS, et al.,

Charles H. Camarekian, Appellant in No. 76-1192
Joseph J. Rega, Jr., Appellant in No. 76-1193
George Santoriello, Appellant in No. 76-1194

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and CARTH, Circuit Judges.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuitin regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Judge

Dated: December 20, 1976

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-553

CHARLES H. GAMAREKIAN, ET AL.,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Feb. 18, 1977.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 10
day of January, 1977.